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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	**WT Docket No. 96-18**
Implementation of Section 309(j) of the Communications Act-- Competitive Bidding	)	**PP Docket No. 93-253**

To: The Commission

COMMENTS

PageMart II, Inc. ("PageMart"), a Delaware corporation, submits these its Comments in connection with the Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced proceeding. The Second Report and Order and Further Notice of Proposed Rulemaking,, FCC 97-59 ("Report and Order"), was released February 24, 1997. Comments on the FNPRM are due to be filed on April 17, 1997.

I. Introduction

1. PageMart, Inc., PageMart's parent company (together, "PageMart"), filed Comments (March 1, 1996) and Reply Comments (March 11, 1996) in connection with the Interim Licensing Proposal in this proceeding, as well as Comments on March 18, 1996 in connection with the overall proceeding.

2. PageMart is a medium-sized, innovative paging company that provides low-cost, nationwide services. PageMart holds both 931 MHz and 929 MHz Commercial Mobile Radio Service licenses for paging services throughout the United States, including PCP licenses for which it qualifies for nationwide exclusivity.

II. Background

3. In the referenced FNPRM, among other things, the Commission requested comments on whether the FCC should impose coverage requirements for nationwide paging licenses and the appropriate coverage area. The Commission also sought comments on whether the Commission should auction the entire nationwide license, or just a portion of the license, if the licensee failed to meet the coverage requirements.

III. Discussion

A. Coverage Requirements for Nationwide Channels

4. PageMart submits that those licensees who have been awarded nationwide exclusivity on the basis of previous rules should be exempt from any additional requirements for nationwide licenses. These licensees reasonably relied on previously existing exclusivity procedures outlined in former rule §90.495(a)(3). Once the licensee has met the requirements for nationwide exclusivity, it would be inequitable for the Commission then to impose a stricter requirement on the nationwide licensee, particularly when at paragraph 51 of the Second Report and Order, the Commission has stated that the licensees have earned *permanent* nationwide exclusivity.

5. However, at paragraph 202, the Commission seems to reverse itself implying that such licensees do not have permanent exclusivity but could be subject to new, unknown, additional requirements and to penalties, i.e., auctions, if they do not comply. It appears to be the Commission's position here that it can raise the standard of qualifications for those who have already qualified for nationwide exclusivity. To apply a new standard retroactively requires a justifiable rationale. See United States v. Storer Broadcasting Co., 351 U.S. 192, 193 (1956). See also, Hispanic Information and Telecommunications Network vs. FCC, 865 F.2d 1289, 1295 (D.C. Cir. 1989). In the present case, the Commission has not come forth with any sufficient rationale for it to apply new build-out requirements retroactively to licensees which have met the previously articulated standard in §90.495 of the Rules.

6. As the Court of Appeals in Mobile Communications Corporation of America, et al. v. FCC, 77 F3d 1399 (D.C. Cir. 1996) pointed out, the Commission must engage in reasoned decision-making. Thus, when it changes positions, the Commission, according to the Court, must address such questions as to whether its new position is consistent with the reliance interests of those affected by its decision. In the present case, the Commission says nothing at all about the possibility of retroactivity. Yet by attempting to "raise the ante" on exclusivity, it is proposing to apply a new standard to matters already decided under the old rules.

7. Landgraf vs. Film Products, 114 S.Ct. 1483, 1499 (1994) states that where a statute "would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed," that is "genuinely retroactivity." 114 S.Ct. 1487. PageMart submits that, under Landgraf, any proposed new 929 MHz nationwide build-out standard would be classified as retroactive.

8. In Bowen v. Georgetown University Hospital, 488 U.S. 204, 209 (1988), the Court stressed that "Retroactivity is not favored in the law" and stated that there must be *substantial justification* for retroactive rulemaking authority. Thus, it becomes a balancing test. See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) which states that retroactive application is improper if "the ill effect of the retroactive application" of the rule outweighs the "mischief" that would result from frustrating the interest of the new rule. See also, Retail, Wholesale, and Department Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987).

9. Because the Commission does not -- and cannot -- state a sufficient underlying substantial purpose, a public interest rationale, for its proposed rules, to balance the inequities to the licensees, it should not impose any additional buildout requirements for licensees awarded nationwide exclusivity under then existing Rules.

10. The Commission must consider the fairest approach to permanent nationwide licensees who have already met the FCC requirements for nationwide exclusivity. Thus, it should exempt nationwide exclusive licensees from any new coverage requirements and judge them under the requirements of the old §90.495(a)(3). In the alternative, if the Commission does decide to impose a different requirement, it must allow some kind of grace period for those current nationwide exclusive licensees to conform to any new standard. Not to do so would deny them any notice or equity in this matter. To do otherwise would be a de facto modification of an licensee's authorization, a taking, which raises serious legal considerations. Business decisions have been made and money invested in reliance on the existing standards. Compare 47 U.S.C. 316.

B. Partitioning and Disaggregation

11. PageMart agrees with the Commission on its observations regarding partitioning. PageMart submits this process may be used to provide geographic and service flexibility to many companies, especially smaller entities who may want to focus on discrete services or coverage areas. PageMart further submits that a partitioning scheme should be permitted for nationwide licenses, as well as EA and MTA based service areas. There is no reason for the Commission to treat nationwide licenses differently with respect to partitioning. Since the proposed rules would apply to a mature industry, this concept would be particularly useful for licensees serving markets with high population areas or large center cities. However, for partitioning to be effective, the initial licensee should retain the original construction and operational obligations of the market.

12. PageMart sees no public benefit in the disaggregation of the existing paging spectrum. PageMart submits that the more spectrum is divided, the less desirable it becomes and the more difficult it is to reaggregate. Issues of co-channel and adjacent channel interference will become a concern if the incumbent paging spectrum is reduced

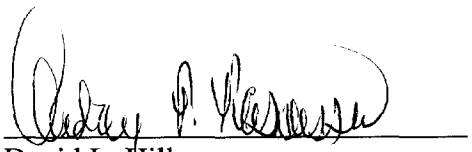
to increments smaller than 25 kHz. Accordingly, PageMart suggests that individual parties seek a waiver of the rules if they are interested in disaggregation.

IV Conclusion

PageMart respectfully requests that the Commission take these Comments into consideration in connection with the above-referenced proceeding.

Respectfully Submitted,

PAGEMART II, INC.



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CERTIFICATE OF SERVICE

I, Gladys L. Nichols, do hereby certify that on this 17th day of April, 1997, the foregoing **COMMENTS** were served to the following persons By Hand:

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